UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HUDSON, in his individual capacity on behalf of himself and others similarly situated, Plaintiff, -against- NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, RETIREMENT BOARD OF THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, KATHERINE "KATIE" BLACKBURN, RICHARD "DICK" CASS, TED PHILLIPS, SAMUEL MCCULLUM, ROBERT SMITH, AND JEFFREY VAN NOTE, Defendants.	No. 1:18-cv-04483-GHW-RWL

DEFENDANT NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION'S OPPOSITION TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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PRELIMINARY STATEMENT

Plaintiff, Christopher Hudson, is a participant in an ERISA benefits plan providing disability benefits to former professional football players. Hudson petitioned for and began receiving disability benefits. He later learned additional information about his disability and petitioned for reclassification to a more generous level of benefits. The board administering the plan denied that petition for failure to show changed circumstances, a showing required by the plan to justify additional benefits. Hudson sued the board and its members, alleging that he was never told the standard for showing changed circumstances, in violation of ERISA (Counts I & II). Hudson also sued the employers and union that collectively bargained the benefits plan, alleging that they failed "to properly monitor their appointees" to the board (Count III). Compl. ¶ 95. Hudson has also sued all Defendants seeking a declaratory judgment that an amendment made to a *different* plan does not apply to him (Count IV), and that a limitations provision in the plan cannot be applied to block his claims (Count V).

In a 60-page report and recommendation on Defendants' motions to dismiss, Magistrate Judge Lehrburger recommended that all Hudson's claims be dismissed with prejudice. Hudson has abandoned Count IV, but objects that his failure-to-monitor claim and his challenge to the plan's limitations provision should not be dismissed. As to the failure-to-monitor claim, the Magistrate Judge correctly concluded that the National Football League Players Association was at most a de facto fiduciary with a limited duty to monitor its appointees and that Hudson had not alleged a breach of that limited duty. As to Hudson's challenge to the limitations provision, the Magistrate Judge correctly found that Hudson's claim was time-barred. Regardless, Hudson's claim was waived because he did not raise it to the Magistrate Judge, and futile because he does not object to the Magistrate Judge's finding that the Players Association is not an appropriate defendant for that claim.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

In May 2018, Hudson filed his Complaint on behalf of himself and a putative class of similarly situated participants of the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Plan"). Dkt. 5. Hudson named as defendants the Retirement Board of the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Retirement Board"), the six individual members of the Retirement Board, the National Football League Management Council ("Management Council"), and the National Football League Players Association ("Players Association").

The gravamen of Hudson's claims is an allegation that the Retirement Board violated ERISA by failing to explain the meaning of "clear and convincing evidence" and "changed circumstances." Compl., Dkt. 5 ¶¶ 67–88 (Counts I & II). Hudson also seeks to hold the Players Association and Management Council liable insofar as they "fail[ed] to properly monitor" their respective appointees to the Retirement Board. Compl., Dkt. 5 ¶¶ 89–95 (Count III). And finally, Hudson has sued all defendants on two final, derivative claims: he challenged a 2017 amendment to a different plan (Compl., Dkt. 5 ¶¶ 96–101 (Count IV)), and a Plan provision regarding the limitations period (Compl., Dkt. 5 ¶¶ 102–112 (Count V)). Only Counts III, IV, and V were brought against the Players Association.

Defendants moved to dismiss. The case was reassigned from Judge Sweet to this Court, which referred Defendants' motions to Magistrate Judge Lehrburger. *See* Report & Recommendation ("R&R"), Dkt. 90 at 2–3 (recounting the procedural history).

MAGISTRATE JUDGE LEHRBURGER'S REPORT AND RECOMMENDATION

In a well-reasoned and thorough 60-page Report and Recommendation, the Magistrate Judge recommended that Defendants' motions be granted, and the action be dismissed with prejudice. R&R, Dkt. 90 at 2. As relevant here, the Magistrate Judge recommended that all claims against the Players Association be dismissed. R&R, Dkt. 90 at 39.

Count III (Failure to Monitor). For Count III, Hudson's failure-to-monitor claim, the Magistrate Judge determined that the Players Association "lacks the fiduciary obligations Hudson accuses it of breaching." R&R, Dkt. 90 at 39. Under ERISA, a person has a fiduciary duty only to the extent he has or exercises control or authority over the plan. *See* R&R, Dkt. 90 at 21–23, 39–42. Hudson's failure-to-monitor claim sought to hold the Players Association liable "for the substantive decisions reached by the Retirement Board." R&R, Dkt. 90 at 41.

Count III failed, the Magistrate Judge concluded, because "the Complaint fails to allege any facts to establish that the [Players Association] either possessed or exercised" control or authority over the Retirement Board's substantive decisions. R&R, Dkt. 90 at 34. Indeed, "[i]n his opposition papers, Hudson even concede[d] that the [Players Association] has no discretionary authority over the Plan or the administrative decisions made by the Retirement Board." R&R, Dkt. 90 at 34 (citing Dkt. 72 at 52).

What is more, "[i]n multi-employer plans, such as the one here, the [Labor Management Relations Act] prohibits an appointing party from directing or supervising the decisions of the independent board members." R&R, Dkt. 90 at 35 (citing 29 U.S.C. § 186; *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329–30 (1981); *Rothstein v. Am. Int'l Group, Inc.*, 837 F.3d 195, 209 (2d Cir. 2016)); *see also* R&R, Dkt. 90 at 20–21.

While "an appointing party has a limited fiduciary duty to ensure that trustees are appointed and removed pursuant to the terms of the plan and carry out their fiduciary functions," Hudson had not alleged any breach of this limited duty. R&R, Dkt. 90 at 27. Hudson "concede[d]" that he did not dispute the qualifications of the appointees to the Retirement Board. R&R, Dkt. 90 at 42. Hudson did not allege that the Players Association's appointees "failed to attend meetings, cast votes, or otherwise execute their functions as trustees." R&R, Dkt. 90 at 42. And Hudson did not

"allege any particular defects in the [Players] Association's monitoring process." R&R, Dkt. 90 at 42.

Finally, the Magistrate Judge also concluded the failure of Hudson's claims against the Retirement Board provided an independent basis for dismissing the failure-to-monitor claim. R&R, Dkt. 90 at 36 n.11. "'A claim for breach of the duty to monitor requires an antecedent breach to be viable,' and '[w]ith no antecedent breach by the monitored parties in this case . . . [the] duty to monitor claim fails.'" R&R, Dkt. 90 at 36 n.11 (quoting *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 580 (S.D.N.Y. 2011)).

Count IV (2017 Amendment to the NFL Player Disability & Neurocognitive Benefit Plan). Count IV sought to invalidate an amendment to a "*separate* benefit plan from the Plan of which Hudson is a beneficiary," and so the Magistrate Judge concluded that Hudson lacked Article III standing to bring the claim. R&R, Dkt. 90 at 55–56. Hudson "does not object to the dismissal of Count IV." Objections, Dkt. 91 at 9 n.1.

Count V (Plan limitations provision). Count V sought "to void the Plan's limitations provision, located at Article 11.7(b), on the theory that the provision itself (and the part of the Summary Plan Description describing it) violate 29 U.S.C. §§ 1022, 1104, and 1110 of ERISA." R&R, Dkt. 90 at 57–58. The Magistrate Judge concluded that "Count V is plainly time-barred." R&R, Dkt. 90 at 58. Hudson's Complaint alleged that the challenged "language was included in both the Plan and Summary Plan Description since at least 2009 and 2010, respectively," and yet Hudson did not sue until 2018. R&R, Dkt. 90 at 58. Under either a three-year or six-year statute of limitations, Hudson's claim was time-barred. R&R, Dkt. 90 at 58–59. The Magistrate Judge also concluded that the Players Association was not an appropriate defendant for because it has no power to "interpret, apply, or enforce provisions of the Plan." R&R, Dkt. 90 at 38 n.12, 42.

ARGUMENT

I. The Magistrate Judge correctly determined that the Players Association is not a named fiduciary of the Plan.

With respect to Count III, Hudson objects to the ruling that the Players Association is not a "named fiduciary," but this objection has been waived, is mistaken, and even if meritorious would not save Hudson's claims.

While Hudson now objects to the ruling that the Players Association is not a "named fiduciary" (Objections, Dkt. 91 at 28–29), that objection has been waived. "In this district and circuit, it is established law that a district judge will not consider new arguments raised in objections to a magistrate judge's report and recommendation that could have been raised before the magistrate but were not." *Ahmed v. Decker*, 2017 WL 6049387, at *5 (S.D.N.Y. Dec. 4, 2017). Hudson's complaint alleged merely that the Players Association was a de facto fiduciary "[b]y virtue of [its] powers to appoint and remove" members of the Retirement Board. Dkt. 5 at ¶ 12 (citing 29 U.S.C. § 1002(21)(A)). Hudson's modest allegation that the Players Association is a de facto fiduciary contrasts with his explicit charge that the Retirement Board is "a named fiduciary." Dkt. 5 at ¶ 12 (citing 29 U.S.C. § 1102). The Players Association argued in its motion to dismiss that "Hudson does not allege that the Players Association is a named fiduciary" (Dkt. 62 at 10)—which Hudson never disputed (*see* Dkt. 72 at 46–55). Hudson cannot now object based on a ground not alleged or argued.

Regardless, Hudson's objection is incorrect. According to Hudson, "[a] 'named fiduciary' is simply one named in the written instrument." Objections, Dkt. 91 at 28. The Plan, however, never names the Players Association *as a fiduciary*. To the contrary, the Plan explicitly states that the Retirement Board is "*the* named fiduciary" with "*full and absolute discretion*" over the Plan. R&R, Dkt. 90 at 39 (quoting Plan at 30, Article 8.2) (emphasis added). It is telling that even in

the cases Hudson cites—none of which involve multi-employer plans or suits against a union—none of the employers were held to be named fiduciaries. *See, e.g.*, *Lutz v. Kaleida Health*, 2019 WL 3556935, at *3 (W.D.N.Y. Aug. 5, 2019) (holding that the employer's "Director of Employee Benefits" was a de facto fiduciary). The Magistrate Judge thus correctly determined that the Players Association "is not a named fiduciary" of the Plan. R&R, Dkt. 90 at 39–40.

In any event, even if the Players Association were a named fiduciary, Hudson's claim would still fail because Hudson failed to allege a breach of the Players Association's limited fiduciary duties. Whether the Players Association is a named or de facto fiduciary, any fiduciary duty of the Players Association would be limited to exercise of its power "to appoint and remove three members of the six-person Retirement Board." Objections, Dkt. 91 at 21. The Magistrate Judge assumed that the Players Association "had at most a limited duty 'to ensure that the appointees are performing their fiduciary obligations,'" and concluded that "Hudson does not allege any act or omission by the Association that would violate the limited duties it had." R&R, Dkt. 90 at 42 (quoting *Liss v. Smith,* 991 F. Supp. 278, 311 (S.D.N.Y. 1998)). Hudson's objection should be overruled.

II. The Magistrate Judge correctly construed the allegations of Count III.

Hudson next objects that the Magistrate Judge "misconstrue[d] . . . Count III" as alleging that "the [Players] Association had fiduciary duties beyond [its] ability to appoint, remove, and monitor." Objections, Dkt. 91 at 29. Because the Magistrate Judge "misconstrue[d]" the allegations, Hudson reasons, the Report and Recommendation contains an "irrelevant" "discussion" rejecting allegations Hudson did not intend to make. To the contrary, it is Hudson's objection that is irrelevant, and in any event, mistaken.

The Magistrate Judge correctly construed the allegations of Count III as being premised on "liability for the substantive decisions reached by the Retirement Board." R&R, Dkt. 90 at 41. As

the Magistrate Judge found, the gravamen of Count III is its allegation that the Players Association "had a duty to 'require the Board' to take certain steps, including 'revis[ing] the [Plan],' 'disclos[ing]' interpretations of Plan terms, 'utiliz[ing] [certain] definitions' of Plan terms, and 'review[ing] and reevaluat[ing]' prior claims for reclassification." R&R, Dkt. 90 at 41 (quoting Complaint, Dkt. 5 at ¶ 94). Hudson objects that Count III merely alleged breaches of a fiduciary duty to "to appoint, remove, and monitor." Objections, Dkt. 91 at 29. But even Hudson's Objections contend that "Count III . . . alleges that the Council and Association should have required the Board *to correct their breaches*." Objections, Dkt. 91 at 30 (emphasis added).

Hudson does not object to—and never disputes—the Magistrate Judge's conclusion that the Players Association lacks control or authority over the Retirement Board's substantive decisions. Relying on ample authority—none of which is disputed by Hudson either—the Magistrate Judge found that "the mere ability to appoint or remove trustees to the board of a retirement plan is insufficient to establish broader fiduciary liability for the trustees' substantive decisions." R&R, Dkt. 90 at 35. The Magistrate Judge also determined that "[i]n multi-employer plans, such as the one here, the [Labor Management Relations Act] prohibits an appointing party from directing or supervising the decisions of the independent board members." R&R, Dkt. 90 at 35. In short, the Players Association had no power to "require the Board" to take certain steps, and thus lacked any relevant fiduciary duty. Complaint, Dkt. 5 at ¶ 94.

In any event, Hudson's objection is "irrelevant" because the Magistrate Judge also found that Hudson failed to state a claim for breach of the Players Association's limited duty to monitor.

III. The Magistrate Judge correctly determined that Count III fails to allege a breach of a fiduciary duty.

Hudson's last objection regarding his failure-to-monitor claim asserts that plaintiffs (including Hudson) necessarily state a claim for breach of the duty to monitor against appointing

fiduciaries whenever they allege a breach of fiduciary duty by the appointee fiduciaries. Objections, Dkt. 91 at 30–31. Hudson's objection lacks merit.

Hudson's objection rests on an "implausib[ly]" broad conception of the duty to monitor, particularly in the context of multi-employer plans. R&R, Dkt. 90 at 35. The standard advocated by Hudson would create an "independent obligation to review the decisions of the trustees for every single purported error and take steps to correct those errors by, *inter alia*, removing trustees with whom they disagree." R&R, Dkt. 90 at 35. "Such a model of liability, as sought by Hudson here, would be unworkable from a practical perspective, and would undermine the [Labor Management Relations Act's] bar against appointing entities from supervising or directing the trustees they appoint." R&R, Dkt. 90 at 35 (citing *In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 760 (S.D.N.Y. 2003); *Johnson v. Evangelical Lutheran Church in Am.*, 2011 WL 2970962, at *5 (D. Minn. July 22, 2011); *Lingis v. Motorola, Inc.*, 649 F. Supp. 2d 861, 881-82 (N.D. Ill. 2009)).

Although Hudson contends that stating a claim for an "inadequate performance by appointee fiduciaries" is enough to state a claim for failure-to-monitor, none of the cases cited by Hudson involved underlying breaches similar to the breaches he alleges. Objections, Dkt. 91 at 30. Every case Hudson cites in support of this contention involved a precipitous decline in a company's stock value. *See* Dkt. 76 at 10 n.3. These cases stand for the unremarkable point that "inadequate performance by appointee fiduciaries" can sometimes be so flagrant and so publicly obvious as to raise a plausible inference of a failure to monitor. Objections, Dkt. 91 at 30. Indeed, in Hudson's lead case, the court found the allegations sufficient because "[a]ssuming that the [defendants] were monitoring [their appointees] at all, they observed the Plan lose 98% of its value, without intervening or replacing any [appointee]." *In re Fannie Mae 2008 ERISA Litig.*, 2012 WL 5198463, at *7 (S.D.N.Y. Oct. 22, 2012). The inadequate performance Hudson complains of—

that the Retirement Board failed to "make sufficient disclosures" about the meaning of particular phrases in the Plan (Objections, Dkt. 91 at 9)—does not even remotely compare to circumstances as flagrant and obvious as a 98% investment loss. Hudson cites no duty-to-monitor case premised on an alleged failure to properly define terms in the summary plan description.

The Players Association had "limited duties" and Hudson did not allege any breach of those duties. R&R, Dkt. 90 at 42. Hudson did not "allege any particular defects in the [Players] Association's monitoring process," did not allege that the Players Association "appointed unqualified trustees," and did not allege that the "appointees failed to attend meetings, cast votes, or otherwise execute their functions as trustees." R&R, Dkt. 90 at 42. Thus, the Magistrate Judge correctly concluded that Hudson had failed to state a claim for breach of the duty to monitor. Hudson's objection should be overruled.

IV. The Magistrate Judge correctly determined that Count V is time-barred.

Hudson's final objection asserts that part of Count V (the part arising under ERISA § 404(a)(1)) was not time-barred because Hudson did not have actual knowledge of his claim more than three years before filing suit. Objections, Dkt. 91 at 32–33. Hudson's objection is futile, was waived, and lacks merit.

As an initial matter, with respect to the Players Association, this objection is futile. The Magistrate Judge found that Count V had "no legal merit" against the Players Association because the Players Association does not have the power to "substantively interpret, apply, or enforce provisions of the Plan" and thus is not an appropriate defendant for this count. R&R, Dkt. 90 at 38 n.12, 42. Because Hudson has not objected to this determination, it is irrelevant as to the Players Association whether Count V is time-barred.

Hudson's objection concerning his lack of actual knowledge is waived because he did not raise the argument before the Magistrate Judge. *See Ahmed v. Decker*, 2017 WL 6049387, at *5.

Defendants moved to dismiss on the basis that Count V was time-barred. *See, e.g.*, Dkt. 57 at 28–29. Hudson's opposition never argued the statute of limitations required actual knowledge. In fact, Hudson devoted only a single footnote to whether Count V was time-barred. *See* Dkt. 72 at 64 n.36.

In any event, the Magistrate Judge correctly determined that Count V—a count seeking to "void the Plan's limitations provision"—was "plainly time-barred." R&R, Dkt. 90 at 57–58. ERISA § 413 establishes a six-year statute of repose, which does not require actual knowledge. 29 U.S.C. § 1113; *see also California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050 (2017) (describing § 1113 as a six-year statute of repose). Hudson's own Complaint "acknowledges that the [challenged] language was included in both the Plan and Summary Plan Description since at least 2009 and 2010, respectively," and yet Hudson did not sue until 2018, more than six years after the alleged breach. R&R, Dkt. 90 at 58. Hudson's objection should be overruled.

CONCLUSION

For these reasons, the Court should adopt the Magistrate Judge's report and recommendation.

New York, New York
Dated: September 26, 2019

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